U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 13 August 2004

Case Nos: 2002-LHC-02600
2002-LHC-02601

OWCP Nos: 13-96344
13-96922

In the Matter of:

JAMES FOUNTAIN,
Claimant

v.

SAN FRANCISCO DRY DOCK,
LEGION INSURANCE COMPANY
Respondents.

Appearances: Steven Birnbaum, Esq.
For the Claimant

Frank Hugg, Esq.
For the Respondents.

Before: Russell D. Pulver
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This case arises from a claim for compensation brought under the Longshore and Harbor Worker's Compensation Act, as amended, 33 U.S.C. §901 ("the Act"). The Act provides compensation to certain employees (or their survivors) engaged in maritime employment for occupational diseases or unintentional work-related injuries, irrespective of fault, occurring on the navigable waterways of the United States or certain adjoining areas, resulting in disability or death. This claim was brought by James Fountain ("Claimant") against San Francisco Dry Dock ("Employer") and its carrier Legion Insurance Co. ("Carrier") arising from injuries sustained to his lower back, abdomen and left leg while employed as a longshore worker.

On August 12, 2002, the Director, Office of Worker's Compensation Programs ("OWCP"), referred this case to the Office of Administrative Law Judges ("OALJ") for a

hearing. The case was assigned to the undersigned on October 15, 2002. A formal hearing was held before the undersigned on November 5-6, 2003, and on March 24, 2004 in San Francisco, California, at which time all parties were afforded a full and fair opportunity to present evidence and arguments. Administrative Law Judge Exhibits ("AX") 1-6, Claimant's Exhibits ("CX") 1-11 and 15-17, and Respondent's Exhibits ("RX") 1-13 were admitted into the record. Claimant, Dr. Fred Blackwell, Dr. John Becchetti, and Dr. James Stark testified at the hearing.

The findings and conclusions which follow are based on a complete review of the record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent precedent.

Stipulations

The parties stipulate and I find:

1. An employer/employee relationship existed as between Claimant and Employer during the relevant periods.

2. Coverage under the Act exists as to the claims against Employer.

3. The claim was timely noticed and filed.

4. Claimant has a cumulative claim for injuries dated January 15, 1997.

5. Claimant's average weekly wage at the time of injury was $710.31.

6. Claimant was paid temporary total disability from January 16, 1997 to February 26, 1997.

7. Respondents are not currently providing compensation or medical benefits.

Issues

The remaining issues to be resolved are:

1. Causation of Claimant's injuries.

2. The date of maximum medical improvement.

3. The extent of Claimant's disability.

4. Employer's entitlement to Section 8(f) Relief.

5. Entitlement to medical expenses.

6. Interest on past due benefits, if any.

7. Assessment of attorney fees and costs.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Summary of the Evidence

Background

Claimant was born in Louise, Mississippi on June 28, 1949. Hearing Transcript ("TR") at 130-131. In 1979, Claimant sustained a shotgun wound to the lower abdomen. TR at 138; RX 3 at 58. Despite surgical repair of the wound, the injury left Claimant incapacitated and unable to work for approximately one year. TR at 138; RX 3 at 58. Due to his injury, Claimant's weightlifting capacity was limited to an occasional 50-100 pounds and frequent 25-50 pounds. Following the injury, Claimant returned to work as a laborer performing light duty work. TR at 138-9.

In 1982, Claimant began working for San Francisco Dry Dock. Claimant testified he was never bothered by the effects of his gunshot wound, and had no trouble with his back prior to working for Employer. TR at 146. For 11 years, Claimant performed the heaviest work imaginable for Employer. TR at 142. Claimant's job duties included stripping down passenger and Navy ships and getting all pump hoses off the ships. These duties involved continuous standing, bending, walking, squatting, gripping, reaching, climbing and lifting up to 150 pounds. CX 3 at 27.

Claimant's medical records revealed evidence of hernia related problems as early as October of 1981. RX 3 at 78-79. Dr. Mark Robinson, a general internist and Claimant's treating physician at Kaiser, diagnosed Claimant with a hernia on August 27, 1995. RX 3 at 78. On September 27, 1995, an examination revealed an asymptomatic bulge in Claimant's right groin area, resulting from possible weakness in the abdominal wall. On this date Claimant was also given support stockings to prevent venous stasis. RX 3 at 79.

In November of 1996, Claimant sustained an injury while working for Employer. Claimant's back went out while pulling up a 75-80 pound pump on a rope from one deck to another. TR at 149. Claimant did not report the injury at the time as he felt it was simply a strain of his back that would resolve. TR at 149-150.

On January 3, 1997, Claimant sustained another injury to his back and abdominal area while working for Employer. TR at 151. The injury occurred while Claimant was pulling up and carrying a hose from the main deck weighing approximately 100 pounds. TR at 152. Claimant continued working, despite a gradual increase in pain. The following day, Claimant reported to his lead man that he had hurt his lower back and groin and was unable to finish his work. TR at 153-4. For the remainder of the day, Claimant worked in the engine room.

On January 15, 1997, Claimant reportedly injured his left leg. On this same day, Claimant was examined by Dr. Bill Balabegian, the company doctor for both his left leg and lower back and groin pain. Dr. Balabegian found no significant injury and diagnosed Claimant with a mild right back strain, phlebitis in the left leg and lower abdominal pain which was not industrially related. RX 7 at 118. Dr. Balabegian advised that Claimant see his treating physician for his non-industrial condition, and released him to full duty work the next day with no limitations. RX 7 at 118-119. Claimant told Employer he was unable to perform his work. Employer replied that Claimant was laid off due to a slow time at work. TR at 21.

On January 16, 1997, Claimant was examined by Dr. Robinson. Claimant was diagnosed with low back pain and a lower abdominal inguinal hernia. CX 10 at 143; TR at 161. Dr. Robinson opined Claimant's condition was industrially related and allowed Claimant to participate in a modified work program. CX 10 at 143.

On January 22, 1997, Claimant was examined by Dr. Becchetti, a general surgeon, at Employer's request. RX 6 at 104. Dr. Becchetti opined Claimant developed an incisional hernia related to surgery that may have, both from the shotgun wound blast as well as the infection, destroyed part of his abdominal wall. RX 6 at 107. He noted the possibility of future enlargement and symptomatology of Claimant's hernia. RX 6 at 157. Dr. Becchetti concluded that Claimant's injury appeared to be a temporary aggravation of Claimant's abdominal wall and low back related to his recent lifting. RX 6 at 157.

On July 2, 1997, Claimant underwent abdominal incisional hernia repair. TR at 161; CX 10 at 193. Claimant was released to resume work on August 13, 1997, by the general surgeon.

On September 3, 1997, Claimant filed two claims for compensation for his injuries. Claimant's first claim was for injuries to his back and abdomen on January 3, 1997. RX 5 at 92. The second claim was for his January 15, 1997, injury to his left leg. CX at 1; RX 5 at 94.

On November 4, 1998, Respondents filed an application for 8(f) relief arguing that most of Claimant's injuries were attributable to his pre-existing hernia resulting from his prior gunshot wound. RX 6 at 100. On December 15, 1998, the Department of Labor replied to Respondent's 8(f) application. RX 6 at 113. The District Director concluded Respondents failed to establish that Claimant's condition was manifest to the employer or that the pre-existing disability combined with the second injury substantively contributed to a greater degree of disability. RX 6 at 113.

On January 14, 2002, Claimant was examined by Dr. Dave Miles Atkins, an orthopedic surgeon. CX 3 at 15. Dr. Atkins opined that it is medically reasonable that Claimant's low back condition was attributable to his work injuries on January 1997 in his capacity as a laborer for Employer. Dr. Atkins also noted Claimant would be unable to perform his usual and customary job activities as a laborer and therefore would be considered a medically qualified injured worker eligible for vocational rehabilitation benefits. CX 3 at 17-18.

On January 16, 2003, Claimant was examined by Dr. Stark. RX 1 at 9. In his medical report, Dr. Stark characterized Claimant's gunshot wound to the abdomen as significant,

resulting in a severe vascular injury to the groin area. RX 1 at 11. Dr. Stark noted that from a vascular or musculoskeletal perspective Claimant never recovered from the injury, as he lost a good portion of his abdominal musculature, which provides support for the back. Individuals with weak abdominal musculature are much more likely to develop back problems. Dr. Stark noted that Claimant's medical records established that he experienced low back pain prior to his injuries in 1997. RX 1 at 11. However, despite his symptomatic lower back condition, Claimant was able to perform his job duties through and after the January 3, 1997 injury. RX 1 at 12. Dr. Stark diagnosed Claimant with mechanical type lower back pain secondary to his lumbar type vertebra and degenerative disc and joint disease. Dr. Stark opined Claimant's left leg injury was non-industrial. He specifically diagnosed the left leg pain as a manifestation of vascular problems due to the abdominal gunshot incident.[1] Dr. Stark opined Claimant lost 25% of his lifting capacity, which would not preclude Claimant from performing his usual and customary work. RX 1 at 12.

On June 23, 2003, Claimant was examined by Dr. Blackwell, a board certified orthopedic surgeon. TR at 39. Dr. Blackwell opined to a reasonable degree of medical probability that Claimant sustained a low back injury during his employment with Employer. TR at 63. Specifically, Claimant's current condition is a function of the injury he sustained in the latter part of 1996 while a working as a laborer. CX 16. The state of Claimant's abdominal musculature prior to his work related injuries was clearly defective, however, Claimant was asymptomatic from 1995 until the time he reported pain in his groin and abdominal area in 1997. TR at 45 and 51. Furthermore, the combination of congenital defects and the pressure that develops from heavy lifting, bending, and twisting are the most logical combination to cause a hernia. TR at 48. Although the origin of the hernia is in an area not related to the gunshot wound, the wound predisposed Claimant to a hernia. TR at 53. Therefore, Dr. Blackwell stated Claimant is materially and substantially worse off today as a result of the combination of the prior gunshot wound and hernia resulting from the last lifting incident while working for Employer because he did not have normal dynamic support for his spine to begin with. TR at 113-114.

On September 10, 2003, Claimant was examined by Dr. Becchetti. RX 8 at 131.1. Dr. Becchetti opined the difficulties in Claimant's lower abdomen are related to his pre-existent condition and that the episode in January of 1997 was a minor temporary flare up, which would respond to a two-week period following the accident of a 35-pound weight restriction and that the patient would then be able to return to his usual and customary duties. RX 8 at 131.6, TR at 278.[2] If the accommodation could not take place, Dr. Becchetti maintains the abdominal difficulties are not industrially related, but are only a natural progression of his disease from his prior gunshot wound resulting in a defective abdominal wall. RX 8 at 131.6. Furthermore, Claimant's physical disability is not industrially related and will not preclude him from his usual and customary duties. RX 8 at 131.6.

[1] Dr. Stark attributed Claimant's left leg pain to the abdominal gunshot incident, evidenced by the leg swelling experienced in 1993 as well as doctor recommendations for special stockings to prevent swelling. RX 1 at 10.

[2] Dr. Becchetti opined Claimant was temporarily totally disabled for a two week period beginning January 3, 1997. Claimant's condition became permanent and stationary two weeks following the January 3, 1997 injury. RX 8 at 131.6.

Claimant testified if not for his injuries, he would be working right now, as he is a hard worker and loved his job. TR at 174. Claimant has not worked as a longshoreman since his lay off in January of 1997. TR at 22.

II. Discussion of Law and Facts

Causation

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. *Parsons Corp. of California v. Director, OWCP*, 619 F.2d 38 (9th Cir. 1980); *Butler v. District Parking Management Co.*, 363 F.2d 682 (D.C. Cir. 1966); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301, 305 (1989); *Kier, supra*. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant' s condition was not caused or aggravated by his employment. *Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989); *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Volpe v. Northeast Marine Terminals*, 671 F.2d 697 (2d Cir. 1981); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. *Sprague v. Director, OWCP*, 688 F.2d 862 (1st Cir. 1982); *Holmes, supra*; *MacDonald v. Trailer Marine Transport Corp.*, 18 BRBS 259 (1986).

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. *See* 33 U.S.C. § 902(2); *U.S. Industries/Federal Sheet Metal, Inc.*, 455 U.S. at 615, *rev'g*, *Riley v. U.S. Industries/Federal Sheet Metal, Inc.*, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to section 2(2) of the Act. *Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979), *aff'd sub nom., Gardner v. Director, OWCP,* 640 F. 2d 1385 (1st Cir. 1981); *Preziosi v. Controlled Industries*, 22 BRBS 468 (1989); *Janusziewicz v. Sun Shipbuilding and Dry Dock Co.*, 22 BRBS 376 (1989) (decision and order on remand); *Johnson v. Ingalls Shipbuilding*, 22 BRBS 160 (1989); *Madrid v. Coast Marine Construction*, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause or primary factor in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. *Strachan Shipping v. Nash*, 782 F.2d 513 (5th Cir. 1986); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15

(1986); *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside of work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046 (5th Cir. 1983); *Mijangos* , 19 BRBS at 17; *Hicks v. Pacific Marine & Supply Co.*, 14 BRBS 549 (S 1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990); *Care v. WMATA*, 21 BRBS 248 (1988).

I have weighed all the evidence in light of the case law set forth hereinabove and find that Claimant has proven that he did suffer a job related injury while employed at San Francisco Dry Dock. There is no question that Claimant, with his already compromised abdominal wall, performed the heaviest work imaginable while working for Employer for 11 years. TR at 142. This fact coupled with the medical opinions that such effort could aggravate his pre-existing hernia condition is sufficient to establish that Claimant suffered an injury, or at the least, an aggravation of his pre-existing injury, while pulling and carrying pumps and hoses in excess of 80 pounds while at work in January of 1997. TR at 48; CX 3 at 17. While Respondents acknowledge that Claimant suffered a lumbar strain or sprain as result of the accident they rely on the testimony of Dr. Stark and argue Claimant's overall impairment and lack of ability to return to work is not a result of the last two injuries that he sustained while lifting the hoses and carrying the pumps. TR at 340. Rather, Claimant was more vulnerable to the effects of a back strain or injury as a result of his prior hernia and gunshot wound because of the lack of abdominal support for his lower back. However, the undersigned finds that while Claimant may have suffered from a disability prior to the incident in January of 1997, Claimant's condition was asymptomatic from at least 1995 until the time of the injury. Based on the medical records and the severe pain Claimant experienced following the 1997 incident, Claimant's injuries were more than transient episodes of pain. The work performed for Employer in terms of the bending, stooping, and lifting of objects in excess of 80 pounds allows the undersigned to conclude Claimant's present condition is industrially related. Accordingly, the undersigned finds that Claimant did incur an injury, or aggravation of a pre-existing injury, to his abdominal hernia and lower back while on the job for Employer.

With regard to Claimant's left leg injury, the undersigned finds there is no substantial evidence in the record to show the condition was caused or aggravated by the incident in January of 1997. While Claimant alleges he suffered a leg injury on January 15, 1997, while working for Employer, there is ample medical evidence demonstrating leg swelling and vascular problems prior to the incident in 1993. In 1995, Claimant was prescribed support stockings to prevent venous stasis. RX 1 at 10; RX 3 at 79. Additionally, doctors who examined Claimant's left leg found his condition non-industrial. Following the incident, Employer's company doctor, Dr. Balabegian, diagnosed Claimant with non-industrial phlebitis in the left leg. RX 7 at 118. Furthermore, Dr. Stark opined Claimant's left leg pain was non-industrial, as it was a manifestation of vascular problems due to the abdominal gunshot incident in 1979. RX 1 at 10. Thus, I find that Claimant is not entitled to compensation for his left leg problem.

Date of Maximum Medical Improvement

An injured worker's impairment under the Act may be found to have changed from temporary to permanent if and when the employee's condition reaches the point of "maximum medical improvement" or "MMI". *James v. Pate Stevedoring Co.,* 22 BRBS 271, 274 (1989); *Phillips v. Marine Concrete Structures*, 21 BRBS 233, 235 (1988); *see also SGS Control Services v. Director, OWCP*, 86 F. 3d 438, 443-44 (5th Cir. 1996). Any disability before reaching MMI would be temporary in nature. *Id*. The date of maximum medical improvement is defined as that time at which the employee has received the maximum benefit of medical treatment such that his condition will not further improve. The determination of the date of MMI is primarily medical and does not rely on economic or vocational considerations. *Louisiana Insurance Guaranty Ass'n v. Abbott*, 40 F.3d 122 (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.,* 20 BRBS 184, 186 (1988); *Manson v. Bender Welding & Machine Co.*, 16 BRBS 307, 309 (1984). Medical evidence must establish the date at which the employee has received the maximum benefit from medical treatment such that his condition will not further improve. *Trask v. Lockheed Shipbuilding & Construction Co.,* 17 BRBS 56, 60 (1985). Accordingly, the determination as to when maximum medical improvement has been reached, so that a claimant's disability may be termed "permanent," is primarily a question of fact based upon medical evidence. *Lozada v. Director, OWCP*, 903 F. 2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989); *Care v. Washington Metropolitan Area Transit Authority*, 21 BRBS 248 (1988).

At issue here are the dates which Claimant's abdominal hernia and lower back injuries reached maximum medical improvement. In evaluating this issue, generally the opinion of the claimant's treating physician is to be accorded greater weight since the physician "is employed to cure and has a greater opportunity to know and observe the patient as an individual." *See Amos v. Director, OWCP,* 153 F.3d 1051, 1054 (9th Cir. 1998), *amended by* 164 F.3d 480 (9th Cir.), *cert. denied sub nom. Sea-Land Serv., Inc. v. Director, OWCP,* 528 U.S. 809 (1999).

Based on the medical evidence provided in the record, the undersigned finds Claimant's hernia condition reached maximum medical improvement on November 2, 1997, approximately four months after his hernia repair surgery. On January 16, 1997, Dr. Robinson diagnosed Claimant with a lower abdominal inguinal hernia and opined the injury was industrially related. CX 10 at 143. At the request of the Respondents, Claimant was also examined by Dr. Becchetti on January 22, 1997 and September 10, 2003. Dr. Becchetti opined Claimant's injury was not industrially related and was either a minor temporary flare up or a natural progression of his pre-existent abdominal condition. Dr. Becchetti also indicated Claimant's hernia condition was permanent and stationary two weeks after the January 3, 1997 injury. RX 8 at 131.6. However, Claimant continued to see Dr. Robinson for his hernia condition following this date. Believing Claimant to be a surgical candidate, Dr. Robinson referred Claimant to Dr. Leslie Enloe, who performed Claimant's abdominal incisional hernia repair on July 2, 1997. TR at 161; CX 10 at 193. Claimant was given a four month recovery period and was released to return to work by Dr. Robinson on November 2, 1997. CX 10 at 115 and 218; RX 13 at 428. The fact that Claimant underwent surgical repair of his hernia, and continued to seek treatment with Dr. Robinson following surgery, allows me to believe that Claimant was still receiving the benefit of medical treatment to improve his hernia condition. Claimant's condition, however, became permanent on November 2, 1997, the date he recovered from surgery and was released to return to work. Claimant's condition is not likely to improve beyond this date because the combined effects of

the gunshot wound and industrial aggravation has left Claimant's abdominal musculature defective beyond repair. Therefore, although Dr. Robinson did not expressly conclude Claimant's abdominal hernia condition was permanent and stationary it is held that Claimant reached maximum medical improvement on November 2, 1997.

As to the lower back injury, Claimant argues his condition is temporary as there is additional treatment that can be rendered to help improve the condition, such as epidural injections. On the other hand, Respondents argue the lower back injury is not industrially related and that Claimant reached maximum medical improvement on February 26, 1997. Respondents rely on the opinion of Dr. Becchetti, who opined Claimant's condition is a temporary aggravation related to his recent lifting while working for Employer or a natural progression of his abdominal defect. RX 6 at 57.

The undersigned is not persuaded by either party's argument and finds substantial evidence in the record to support the finding that Claimant reached maximum medical improvement as to his lower back condition on July 2, 1998. The fact that Dr. Yano ordered a scan of Claimant's thoracic spine on March 3, 1998, demonstrates Claimant was still receiving the benefit of medical treatment to improve his condition. Furthermore, an April 29, 1998, Doctor's Certificate signed by Dr. Yano authorized Claimant's July 2, 1998 return to work. CX 9 at 175. The undersigned finds July 2, 1998 an appropriate date for maximum medical improvement because it allows me to believe that all remedies were exhausted in attempting to improve Claimant's condition. Claimant's argument that future epidural injections will help improve Claimant's condition is refuted by its own witness Dr. Blackwell, who testified that epidural injections will only serve to treat Claimant's symptoms and will not rehabilitate him physically to be able to perform his prior work activities. TR at 65. Therefore, based on the above, the undersigned finds Claimant's condition became permanent on July 2, 1998, the date Claimant was released to return to work.

Based on the medical evidence in the record, the undersigned determines Claimant's hernia condition and lower back injury reached maximum medical improvement on November 2, 1998 and July 2, 1998, respectively.

Extent of Claimant's Disability

Under the Act, Claimant has the initial burden of establishing the extent of his disability. *Trask v. Lockheed Shipbuilding & Constr. Co.* 17 BRBS 56, 60 (1985). Disability under the Act means incapacity as a result of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment…." 33 U.S.C. 902(10). In order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. *Sproull v. Stevedoring Servs. Of America,* 25 BRBS 100, 110 (1991). As Claimant's hernia condition and low back injury are non scheduled injuries, he must prove that he has suffered a loss of wage-earning capacity.

As to the extent of Claimant's disability, under the Act a claimant is presumed to be totally disabled where the claimant establishes an inability to return to the claimant's usual

employment. *Manigault v. Stevens Shipping Co.,* 22 BRBS 332, 333 (1989); *Elliot v. C&P Tel. Co.,* 16 BRBS 89, 91 (1984). Here, through medical evidence and expert testimony, Claimant established that following the incident in January of 1997, his hernia condition and lower back injury left him temporary totally disabled. However, once Claimant reached maximum medical improvement on November 2, 1997 for the hernia condition and July 2, 1998 for his lower back injuries, Claimant's condition became permanent and total. I find that Claimant could not return to his former employment. Therefore, Claimant has met his burden, and is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.,* 19 BRBS 171 (1986).

To rebut the presumption of total disability, Respondent must present evidence of suitable alternate employment that Claimant is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981). To meet this burden, Employer must show the availability of job opportunities within the geographical area in which Claimant was injured or in which Claimant resides, which he can perform given his age, education, work experience and physical restrictions, and for which Claimant can compete and reasonably secure. *Id. at 1042-43; Hansen v. Container Stevedoring Co.,* 31 BRBS 155, 159n.5 (1997). When Respondent establishes suitable alternate employment, Claimant's total disability becomes partial. *Palombo v. Director, OWCP,* 937 F.2d 70, 73 (2d Cir. 1991).

Here, Respondents assert that at least eight jobs were available to Claimant, as identified in the labor market surveys performed by Robert Cottle on September 28, 2000 and February 7, 2003.[3] According to Mr. Cottle, these positions were within Claimant's physical limitations, comported with his educational and vocational background, and were locally available.

The first of these positions, Janitor in Pleasanton, California, paid $7.50 to $9.34 per hour and included full benefits. RX 2 at 29. This position entailed vacuuming, dusting, wiping surfaces, emptying waste baskets, cleaning mirrors and toilets and damp mopping floors. *Id.* There was no heavy lifting involved or allowed. *Id.*

The second position, Parking Attendant in San Francisco, California, paid $8.00 per hour, plus full benefits. RX 2 at 30. This position required standing, walking, getting in and out of cars, and driving for short distances. Non-driving positions required attendants to stand in a stationary position on assigned floors. *Id.*

The third position, Security Guard in Oakland, San Francisco and Santa Clara, California, paid $8.00 to $9.00 an hour. RX 2 at 30-31. The desired qualifications for the position varied depending upon the assignment. *Id. at 31.* Lobby and Parking Kiosk security jobs were less physically demanding and allowed the employee to sit and stand as desired. *Id.* The other security guard positions required walking periodic patrols of anywhere from 20-40 minutes during each one to two hour period. Chasing, running and apprehending was not part of the job. *Id. at 31-32.*

The fourth position, Auto Parts Driver in Concord, California, paid $9.88 per hour plus benefits. RX 2 at 33-34. The position entailed driving to deliver auto parts to auto body and

[3] The first six positions are outlined in Cottle's first market survey dated September 28, 2000. The remaining two positions are detailed in the supplemental survey dated February 7, 2003.

repair shops. The position required sitting in an automobile for ten to thirty minutes, and some bending and lifting of ten to fifty pounds. *Id.*

The fifth position, Plant Tech in Emeryville, California, paid $8.00 an hour, plus medical benefits. RX 2 at 34. The position required performing plant care duties while standing with intermittent walking to and from each site. *Id. at 34*. Occasional reaching and bending was required when pruning, fertilizing and watering plants. *Id.* Plant Techs often ride BART to client locations. *Id.*

The sixth position, Assembler at ARIA Technologies, Inc. in Livermore, California, paid $7.25 to $9.00 per hour, plus medical benefits. RX 2 at 34-35. The employer was hiring and willing to train workers for Ceramic Fiber Optic Cable Connector Assembly. *Id.* Assembly duties were performed at a worktable, and testing and polishing was done while standing. *Id.*

The seventh position, Cashier at gas stations and a movie theatre in San Francisco, Dublin, Pleasanton, Orinda, Danville and Concord, California paid $7.00 to $8.00 an hour.[4] RX 2 at 36.4 and 36.5. The physical demands were sedentary in nature and required lifting a cash drawer weighing less than five pounds. *Id.* at 36.5. A high stool was available allowing employees to sit or stand at will. *Id.* While the ability to read and write was not required, in some of the positions, employees were required to count merchandise at the end of their shifts. *Id.*

The eighth position, School Crossing Guard in Concord, California paid $7.00 per hour. RX 2 at 36.6. Crossing Guards are responsible for escorting children safely across streets. *Id.* The position requires walking the length of the street intersection many times during a work shift, but allows for the employee to bring a portable chair to use when there are lags in activity. *Id.*

Dr. Blackwell opined that while some of these positions may be within Claimant's physical capacities, Claimant is severely limited due to his back and hernia condition.[5] Dr. Blackwell approved the security guard position, but opined Claimant would not be able to do security work that puts him in harms way because he would not be able to react quickly enough to get out of the way. *Id*. Dr. Blackwell also approved the school crossing guard position if for a couple of hours a day. TR at 106. However, Dr. Blackwell opined the parking attendant and janitor positions were beyond Claimant's capabilities. A position as a parking attendant, which involves getting in and out of cars frequently will cause problems for Claimant because of the bending and twisting of the back. *Id.* The janitor position may be difficult because of the continuous walking and standing. Claimant would be restricted to light work that would allow him to walk and stand intermittently and lift no more than 10 pounds. TR at 108.

Dr. Stark opined Claimant's modest intellectual capacities preclude him from a large portion of the labor market, rendering rehabilitation efforts more challenging than would

[4] The cashier positions were available with the following employers: various Chevron stations, Shell stations in Concord, Dublin, Pleasanton, Orinda, and Danville, and at Landmark Theatres in San Francisco, California. RX 2 at 36.4.

[5] Restrictions imposed on Claimant include performing only light duty work that requires minimal physical effort and no lifting of more than 25 pounds. Claimant should not simultaneously bend, lift, and twist. TR at 61.

otherwise be the case. RX 1 at 13. However, Dr. Stark believes Claimant has an ability to return to the work force, and opined there are several jobs outlined in Mr. Cottle's report that are within Claimant's physical capacities.[6] RX 1 at 12.

Based on the evidence provided in the record, the undersigned finds the Security Guard, Plant Tech, Non-driving Parking Attendant, Cashier and School Crossing Guard positions all comport with Claimant's physical restrictions, employment experience, and education level. Although Claimant completed the 6th grade, he is approaching functional illiteracy. TR at 134. Claimant is restricted to performing light duty work that requires minimal physical effort. TR at 61. Claimant should not lift more than 25 pounds and should not simultaneously bend, lift, and twist. TR at 62. None of these identified positions required lifting more than ten pounds. None of the positions required bending and twisting and some of the jobs only required occasional walking and standing. None of the positions identified required literacy skills.[7] Furthermore, the positions were located within the geographical area in which Claimant resided at the time of injury. Accordingly, the undersigned concludes Respondents established the existence of suitable alternate employment on September 28, 2000, thereby rebutting the presumption of total disability.

If Claimant is able to present evidence of his diligence in searching for employment, he may nonetheless still be considered totally disabled. *Palombo,* 937 F.2d at 73; *Turner*, 661 F.2d at 1043. Claimant is not required to apply for the specific jobs identified by Employer, but need only establish that he was reasonably diligent in attempting to secure a job "within the compass of employment opportunities shown by the employer to be reasonably attainable and available. *Turner*, 661 F.2d at 1043. Claimant bears the burden of proving a diligent search and willingness to work. *Palombo,* 937 F.2d at 73.

According to Claimant, his wife called some of the employers on the survey list, and nothing materialized. TR at 211. Claimant testified that he has not looked for any other work since the injury because he does not believe he can perform any other work. TR at 168. Despite Claimant's testimony, he failed to provide evidence of the numbers, names, job description or job search protocol to establish evidence of the amount of effort that was actually put into the job search process. As Claimant carries the burden on this issue, the undersigned finds that he has failed to show that he conducted a diligent search for employment. As a result, the undersigned concludes Claimant was partially disabled as of September 8, 2000. *Palombo,* 937 F.2d at 77.

Compensation

Claimant's compensation is based on his average weekly wage, which is calculated using one of the methods described in Section 10 of the Act. 33 U.S.C. §910(a)-(d); *Gilliam v. Addison Crane Co.,* 21 BRBS 91 (1987). The average weekly wage should reflect a fair estimate of a claimant's earning power at the time of injury. *Orkney v. General Dynamics Corp.,* 8 BRBS 543

[6] Dr. Stark did not specify positions that were within Claimant's capabilities.

[7] Specifically, the parking kiosk position provides assistance when necessary to complete written reports. RX 1 at 32. The cashier position only required the ability to match credit card names with customer identification, such as a driver's license. The position also required basic math abilities and counting back change was part of the on-the-job training. RX 2 at 36.4.

(1978). In the instant case, the parties stipulated that Claimant's average weekly wage was $710.31.

For total disability, whether temporary or permanent, Claimant is entitled to compensation at the rate of 66 2/3 percent of his average weekly wage. 33 U.S.C. §908(a)-(b). Accordingly, Claimant should be compensated at the rate of $473.53 per week from February 26, 1997 to September 8, 2000.

For permanent partial disability, Claimant is entitled to compensation at the rate of 66 2/3 percent of the difference between his average weekly wage and his post-injury wage earning capacity. 33 U.S.C. §908(c)(21). According to the Vocational Evaluation Report, the positions available to Claimant paid between $7.00 to $9.00 per hour. The average of these wages at $8.00 per hour would allow Claimant's post injury wage to be $320.00 per week. As Claimant's average weekly wage is $710.31 and his post injury wage is $320.00 per week, Claimant is entitled to 66 2/3 percent of the difference, or $260.21 per week beginning September 8, 2000 and continuing.

Employer's Entitlement to Section 8(f) Relief

Under Section 8(f) of the Act, an employer may limit its liability for payment of permanent disability to 104 weeks compensation if three elements are present:

(1) The injured worker had an existing permanent partial disability before the most recent injury;

(2) The injured worker's existing permanent partial disability was manifest to the employer before the most recent injury; and

(3) Depending on whether the present disability is total or partial,

  (a) if the present permanent disability is total, it is not due solely to the most recent injury; or

  (b) if the present permanent disability is partial, it is materially and substantially greater than that which would have resulted from the most recent injury alone without the contribution of the pre-existing permanent partial disability.

33 U.S.C. § 908(f); *Lockheed Shipbuilding v. Director, OWCP*, 25 BRBS 85, 87 (CRT) (9th Cir. 1991); *see Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.* (*Carmines*), 138 F.3d at 138-39.

The Respondents claim they are entitled to Section 8(f) relief. Respondents contend Claimant's existing hernia condition, combined with the injury in 1997 to make his current disability materially and substantially greater than would have resulted from the subsequent injuries alone. On the other hand, the Solicitor's Office argues that the Employer's application for Section 8(f) relief should be denied because: 1) there is insufficient evidence presented to

establish that Claimant sustained a permanent disability as a result of the injuries he sustained in November 1996 and January 1997, and 2) if the court finds Claimant sustained a permanent disability as a result of either or both injuries in 1996 and 1997, then the director takes the position that Employer/Carrier has not submitted sufficient evidence to establish contribution for the purpose of obtaining relief under Section 8(f) of the Act.

I find merit to Respondent's arguments and therefore grant Section 8(f) relief.

Requirement for a Pre-existing Permanent Disability

The pre-existing permanent disability must predate the employment related injury. *Mikell v. Savannah Shipyard Co.*, 26 BRBS 32, 37 (1992). The mere fact of a past injury does not itself establish disability. Rather, "there must exist, as a result of that injury, some serious, lasting physical problem." *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1145-46, 25 BRBS 85 (CRT) (9th Cir. 1991).

Here, Claimant suffered severe injuries in 1979 as a result of a gunshot wound to his abdomen. The record clearly indicates the 1979 injury produced lasting physical problems as the lack of abdominal wall support for his lower back left Claimant vulnerable to the effects of a back injury and/or hernia. While Claimant was released to return to work, his weightlifting capacity was restricted to an occasional 50-100 pounds and frequent 25-50 pounds. However, as early as 1981, Claimant suffered from hernia related problems while performing light duty work. RX 3 at 78-79. In 1982, Claimant began working for Respondent, performing the heaviest work imaginable for the next 11 years, and in 1995, Claimant was diagnosed with an asymptomatic bulge in the right groin area. *Id.* Claimant's abdominal wall remained in a weakened state, susceptible to a permanently disabling injury, which in fact occurred in 1997 while working for Respondent. Therefore, the undersigned finds Claimant's abdominal defect constituted a pre-existing permanent disability.

Requirement that the Pre-existing Disability Be Manifest

A pre-existing impairment is manifest if the employer knew or could have discovered the impairment prior to the second injury. *Director, OWCP v. General Dynamics Corp.,* 980 F.2d 74, 80-83 (1st Cir. 1992); *Lowry v. Williamette Iron and Steel Co.,* 11 BRBS 372 (BRB 1979). The existence or availability of records showing the impairment is sufficient notice to meet the manifest requirement. *Director v. Universal Terminal and Stevedoring Corp.,* 575 F.2d 452, 455-457 (3d Cir. 1978); *Todd v. Todd Shipyards Corp.,* 16 BRBS 163 (BRBS 1984). Furthermore, virtually any objective evidence of the pre-existing permanent partial disability, even evidence which does not indicate the permanence or severity of the disability, will satisfy the manifest requirement since it could alert the employer to the existence of a permanent partial disability. *Director, OWCP v. Berkstresser*, 921 F.2d 306, 309-311 (D.C. Cir. 1990).

Here, Respondents proved the pre-existing injury was constructively manifest to it by demonstrating that there were clearly identified records regarding the 1979 gunshot wound and numerous medical reports documenting the extent of Claimant's hernia related problems and

establishing a specific diagnosis of an abdominal hernia prior to the 1997 injury. As such, the pre-existing disabilities of the Claimant were manifest to Respondents.

Requirement that the Pre-existing Disability Contributed to the Subsequent Injury

When an ultimate permanent disability is only partial, as in this case, the employer must establish that the disability is materially and substantially greater than the disability that would have resulted from the subsequent injury alone. 20 C.F.R. §702.321(a)(1). In order to determine whether this requirement has been satisfied, a fact finder must consider the level of disability that would have resulted from a claimant's work-related injury if the claimant had not already had a pre-existing disability at the time of the injury. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.,* 8 F.3d 175, 185 (4th Cir. 1993)**.**

Based on the record, the undersigned finds the medical evidence clearly supports a finding that the Claimant's disability is not solely due to his most recent work injury. Respondents rely on Dr. Stark, who testified the 1997 injury was a fairly minor event considering the preexisting pathology so well defined in the record. TR at 340. Furthermore, Dr. Stark also explained the combination of the last back injury, hernia, weakness and venous insufficiencies, have caused Claimant's overall disability to be materially and substantially greater than could be attributed to the last incident alone because it involves more anatomical areas, it goes from just the abdomen and the leg to also include the lower back and substantially because of the combining effect of all these problems limiting his lifting ability and standing capacity as well. TR at 371. Dr. Blackwell also opined that Claimant was materially and substantially worse off today as a result of the combination of the prior gunshot wound and hernia with the last lifting incident because he did not have the normal dynamic support for his spine to begin with. TR at 114. Therefore, I find the contribution requirement has been met by Respondents.

Because there was a pre-existing disability, manifestation to the Respondent of a pre-existing disability, and contribution of a pre-existing disability to the January 15, 1997 injury, Respondent's application for Section 8(f) relief is hereby GRANTED.

Interest

Claimant is entitled to interest on any accrued unpaid compensation benefits. *Watkins v. Newport News Shipbuilding & Dry Dock Co.,* 8 BRBS 556, 559 (1978), aff'd in part, rev'd in part sub nom.; *Newport News Shipbuilding & Dry Dock Co., v. Director*, OWCP, 594 F.2d 986 (4th Cir. 1979). Interest is mandatory and cannot be waived in contested cases. *Canty v. S.E.I. Maduro,* 26 BRBS 147 (1992); *Byrum v. Newport News Shipbuilding & Dry Dock Co.,* 14 BRBS 833 (1982); *MacDonald v. Sun Shipbuilding & Dry Dock Co.,* 10 BRBS 734 (1978). Accordingly, interest on the unpaid compensation amounts due and owing by Respondents should be included in the District Director's calculations of amounts due under this decision and order.

Attorney Fees and Costs

Thirty (30) days is hereby allowed to Claimant's counsel from the submission of such an application. See 20 C.F.R. 702.132. A service sheet showing that service has been made upon all the parties, including the claimant, must accompany this application. The parties have fifteen (15) days following the receipt of any such application within which to file any objections.

ORDER

Based on the foregoing Findings of Facts, Conclusions of Law and upon the entire record, I issue the following order. The specific computations may be administratively calculated by the District Director.

It is therefore **ORDERED** that:

1. The Respondents shall pay to the Claimant compensation for his unscheduled injuries as temporary total disability in the amount of $473.53 per week from February 26, 1997, the date Respondents ceased payments, to November 2, 1998, and permanent total disability in the amount of $473.53 per week from November 3, 1998 to September 8, 2000, the date Claimant's injuries became classified as permanent partial.

2. The Respondents shall pay to the Claimant permanent partial disability payments for his unscheduled injuries commencing September 8, 2000 and continuing, at the rate of $260.21 per week.

3. The Respondents are entitled to Section 8(f) relief.

4. Pursuant to Section 7 of the Act, Respondents shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's abdominal hernia and lower back injuries may require, subject to the provisions of Section 7 of the Act.

A

Russell D. Pulver
Administrative Law Judge